No. 83-1038

In the Supreme Court of the United States

OCTOBER TERM, 1983

HELEN DORING, EXECUTRIX OF THE ESTATE OF JESSIE E. KERBER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for failure to file a tax return on time, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The question presented is whether a taxpayer's reliance on tax advisors to prepare a return for her constitutes "reasonable cause" sufficient to defeat the late-filing penalty, where the return is filed late in part because of the advisors' negligence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A10) is reported at 717 F.2d 454. The opinion of the district court (Pet. App. A1-A6) is unofficially reported at 83-1 U.S. Tax Cas. (CCH) para. 13,524.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on September 23, 1983. The petition for a writ of certiorari was filed on December 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Jessie E. Kerber died on October 10, 1977. Under her will, petitioner Helen Doring was appointed executrix of her estate. Petitioner was 76 years old at the time of her

appointment and had previously been employed as a bank teller and a bookkeeping clerk (Pet. App. A2). Shortly after decedent's death, petitioner retained Michael P. Harris to serve as attorney for the estate (*ibid.*). Harris had practiced law for 12 years; his practice included probate work, but did not include preparation of federal estate tax returns (*id.* at A2, A8 n.2).

In discussing petitioner's duties as executrix, Harris explained that the estate would probably be required to file an estate tax return (Pet. App. A2; H. Dep. 4-5).[1] Harris testified that he could not recall advising petitioner of a specific deadline for filing the return, but stated that, if he had so informed her, he would have told her that the return was due 12 months after the date of Kerber's death (Pet. App. A2, A8 n.1; H. Dep. 12, 15). This information would have been erroneous; Section 6075(a) of the Code[2] provides that an estate tax return "shall be filed within 9 months after the date of the decedent's death." Petitioner testified as to her belief that Harris, at some point, had mentioned a specific date for filing the return, but she could not remember what Harris had said (Pet. App. A2, A8 n.1; D. Dep. 12-13, 16).

On March 29, 1978, about six months after Kerber's death, petitioner retained an accountant to prepare the estate tax return (Pet. App. A2-A3). After several inquiries, petitioner ascertained that the accountant was making no progress in preparing the return and discharged him (*id.* at A3). On June 15, 1978, petitioner formally retained another

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[1]"H. Dep." refers to the deposition of Michael P. Harris, and "D. Dep." refers to the deposition of Helen Doring, both of which were introduced into evidence in the district court.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

accountant (*ibid.*). Harris had previously told the new accountant that an estate tax return had to be filed, but failed to alert him as to the date of Kerber's death (H. Dep. 10-11). Harris did not inform the accountant of the date of death, or provide him with any other information about the estate, until August 2, 1978, by which time the estate tax return was already three weeks past due (Pet. App. A3). Harris attributed this delay to his and the accountant's vacation schedules and to his erroneous belief that the estate tax return was due 12 months after Kerber died, so that "there was no particular emergency to do anything" (H. Dep. 11-12). Upon discovering the date of death, the accountant realized that the return was overdue and sent a check to the I.R.S. for the estate taxes he estimated to be owing (Pet. App. A3).[3] The return itself was eventually filed on October 10, 1978, three months late (*ibid.*).

2. Section 6651(a)(1) imposes an "addition to the tax," commonly referred to as a "penalty," for failure to file a tax return (including an estate tax return) on time. The penalty is 5% of the amount "required to be shown as tax on such return" for each month the return is delinquent, up to a maximum of 25% in the aggregate. The penalty is applicable unless the taxpayer demonstrates that his failure to file on time was "due to reasonable cause and not due to willful neglect" (*ibid.*). A delay is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the

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[3]The accountant also filed with the I.R.S. a request for an extension of time to file the estate tax return (Pet. App. A3). The record does not reveal what became of this request, but the district court correctly surmised that it had been denied (*id.* at A3 n.3). The Regulations require that a request for an extension of time to file a return be submitted in writing "on or before the due date of such return." Treas. Reg. § 1.6081-1(b)(1). The accountant did not submit his request until August 2, 1978, some three weeks after the due date had passed.

prescribed time." Treas. Reg. § 301.6651-1(c)(1). Section 6651(a)(2) imposes a similar penalty for failure to pay a tax when due.

The Commissioner determined that "reasonable cause" had not been shown for late filing of the return or for late payment of the tax. He accordingly asserted penalties against the estate in the amounts of $19,004 under Section 6651(a)(1) and $401 under Section 6651(a)(2) (Pet. App. A9). Petitioner paid the penalties and sued for a refund in the United States District Court for the Western District of Missouri, alleging that she had relied on the estate's tax advisors to file a timely return and that such reliance constituted "reasonable cause" for the late filing (*id.* at A4).

3. On cross motions for summary judgment, the district court awarded summary judgment in favor of the government (Pet. App. A1-A6). The court noted that two factual issues remained in dispute: whether Harris had informed petitioner of the filing date, and what the nature and extent of petitioner's contacts with Harris were concerning the probate administration (*id.* at A2 n.1). But the court held that it "need not decide whether genuine issues exist[ed] as to these factual matters," reasoning that "the facts [were] not material to [its] decision" in light of Eighth Circuit precedents (*ibid.*). Noting that "the Eighth Circuit [had] spoken definitively on [the] issue," the district court held as a matter of law that "reliance on professionals to file on time does not constitute reasonable cause to miss statutory deadlines." *Id.* at A5 (citing *Boeving* v. *United States,* 650 F.2d 493 (8th Cir. 1981); *Estate of Lillehei* v. *Commissioner,* 638 F.2d 65 (8th Cir. 1981)).

The court of appeals affirmed in a per curiam opinion (Pet. App. A7-A10). It reiterated the principle, established in a long line of Eighth Circuit cases, that "[t]he executor or executrix has a personal and nondelegable duty to file a

timely return," and that reliance on tax advisors "is not sufficient to constitute 'reasonable cause' for failing to fulfill that duty." *Id.* at A10 (quoting *Boeving*, 650 F.2d at 495). The court noted (Pet. App. A10 n.5) that its holding conflicted with the Seventh Circuit's decision in *United States* v. *Boyle*, 710 F.2d 1251 (1983), petition for cert. pending, No. 83-1266.

DISCUSSION

1. This case presents a question identical to that presented in *United States* v. *Boyle*, No. 83-1266. As we contend in our petition for certiorari in that case, the court of appeals here correctly held that reliance on tax advisors does not establish "reasonable cause" sufficient to defeat the statutory penalty for the negligent late filing of a tax return. 83-1266 Pet. 7-11. The Eighth Circuit's holding to this effect reaffirms a long line of is own precedents (*e.g.*, *Crouse* v. *United States*, 711 F.2d 102 (1983); *Smith* v. *United States*, 702 F.2d 741 (1983); *Boeving*, *supra*; *Estate of Lillehei*, *supra*), and is in accord with the views of the Fifth and Ninth Circuits. See *Millette & Associates, Inc.* v. *Commissioner*, 594 F.2d 121, 124-125 (5th Cir.), cert. denied, 444 U.S. 899 (1979); *Logan Lumber Co.* v. *Commissioner*, 365 F.2d 846, 854 (5th Cir. 1966); *Dritz* v. *Commissioner*, 28 T.C.M. (CCH) 874 (1969), aff'd per curiam, 427 F.2d 1176 (5th Cir. 1970); *Ferrando* v. *United States*, 245 F.2d 582 (9th Cir. 1957). As the court below noted (Pet. App. A10 n.5), however, its decision conflicts with the Seventh Circuit's holdings in *Boyle* and in *Rohrabaugh* v. *United States*, 611 F.2d 211 (1979). In those cases, the Seventh Circuit adopted a facts-and-circumstances test, holding that reliance on tax advisors may constitute "reasonable cause" sufficient to defeat the late-filing penalty depending on whether the executor has significant business experience, is informed of the return's due date, and maintains regular contact with the estate's tax advisors concerning progress on the return. *E.g.*, *Boyle*, 710 F.2d at 1252-

1253; *Rohrabaugh*, 611 F.2d at 216-219. Because of the squa e conflict in the circuits and the administrative importance of the issue, we urge that certiorari be granted in *Boyle*. 83-1266 Pet. 11-13.

2. We think that *Boyle*, because of its clearer factual record, offers a somewhat better vehicle for deciding the legal issue involved. Although we believe that the availability of a "reliance on counsel" defense to the late-filing penalty should generally not turn on the facts of a particular case, that view has not been shared by some lower courts (particularly the Seventh Circuit) that have considered the question. As petitioner here acknowledges (Pet. 3-4 & n.1), "the record is not clear" in this case as to two important facts—whether the estate's tax advisors informed petitioner of the return's due date, and, if so, whether the date of which they informed her was the correct one. See page 2, *supra*. As the district court noted below (Pet. App. A2 n.1), moreover, the precise nature and extent of petitioner's contacts with Harris concerning progress of the probate administration is also in dispute here. The trial court did not resolve these uncertainties, holding that it "need not decide whether genuine issues exist[ed] as to these factual matters, [since] the facts [were] not material to [its] decision" (*ibid.*) under Eighth Circuit precedents holding the "reliance on counsel" defense unavailable as a matter of law.

Since a number of courts (including the Seventh Circuit) have found facts of this sort pertinent in determining the availability of the "reliance on counsel" defense (see, *e.g.*, *Rohrabaugh*, 611 F.2d at 216-218), and since there is no ambiguity as to the analogous facts in the *Boyle* case (see 83-1266 Pet. 2-3), we suggest that the Court grant certiorari in No. 83-1266 and hold this case pending decision there. Alternatively, if the Court deems it beneficial to have the divergent factual patterns before it as an aid to decision, we

urge that certiorari be granted in both cases. In the latter event, the Court may wish to consolidate the cases for briefing and argument.

CONCLUSION

If certiorari is granted in No. 83-1266, the instant petition should be held pending decision there. Alternatively, both petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

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